

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
3:07 CV 00011**

ELENA M. DAVID, et al.,

Plaintiffs,

v.

J. STEELE ALPHIN, et al.,

Defendants.

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**DEFENDANTS' MOTION TO CONTINUE STAY OF DISCOVERY AS TO ISSUES OF  
MARKET TIMING INVOLVING BANK OF AMERICA AND ITS AFFILIATED  
MUTUAL FUNDS**

On August 17, 2009, the Court entered an Order staying discovery on the issues of “market timing” raised in this action for 60 days because “substantially similar discovery and resolution of issues of market timing” are involved in both this case and a pending MDL proceeding involving Bank of America and its affiliated mutual funds. Also, that MDL court now has before it the decision to “approve[e] or disapprove[e] an agreement that may well impact whether plaintiffs herein can go forward on their claims related to market timing.” *See* August 17, 2009 Order Granting Defendants’ Motion to Stay Discovery as to Issues of Market Timing Involving Bank of America and Its Affiliated Mutual Funds (“Order”) [Dkt. No. 135] at 3. As contemplated in the Court’s Order, Defendants are by this motion reporting back to the Court on the progress in the MDL and seeking to continue the stay because the MDL court has

not yet completed its work. Specifically, Defendants move to continue the stay of discovery on market timing issues for another 60 days, or until the court presiding over the market-timing multi-district litigation rules on the stipulated settlement as to claims involving NationsBank/Bank of America, whichever is sooner. Defendants make this request on the same grounds identified by the Court in its order granting the stay on the discrete “market timing” issue (while permitting discovery to continue in the case on all other issues). Order at 3.<sup>1</sup>

At the time Defendants moved to stay market-timing discovery, a settlement hearing was scheduled to occur in the MDL in September 2009. That hearing was postponed, and has been continued to a date to be determined. On October 9, 2009, a representative of the MDL plaintiffs submitted a letter to the MDL court noting that although stipulations of settlement had been completed between plaintiffs and a number of defendants, including Nationsbank/Bank of America, settlement stipulations in other sub-tracks of the MDL remained outstanding. (*See* Letter of John B. Isbister, Plaintiffs’ Administrative Chair, to Judges Motz and Blake, October 9, 2009 (“Isbister Letter”) at 1, attached hereto as Exhibit A.)

The MDL parties have suggested—and the MDL court has agreed—that consideration of the proposed settlements in the action be made when all or substantially all of the parties in the MDL’s 17 sub-tracks have entered into stipulations of settlement. *See, e.g.*, Isbister Letter at 1. Therefore, because a sufficient number of parties have not yet entered into stipulations, the MDL court has not rescheduled the hearing to consider Nationsbank/Bank of America’s settlement. The Isbister Letter stated that progress was being made in completing the stipulations of settlement among the parties, and in preparing necessary documentation ancillary to the

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<sup>1</sup> Prior to filing this motion, Defendants contacted Plaintiffs via their counsel by telephone to seek Plaintiffs’ agreement to continue the stay of discovery as requested in this motion. Plaintiffs’ counsel informed Defendants that Plaintiffs continue to oppose the stay for the reasons stated in their prior submission.

settlement. (*Id.* at 2.) Another update from the plaintiffs is due to be filed with the MDL court on November 13, 2009. (*Id.*) Thus, while progress is slower than anticipated, the parties continue to move toward settlement of the MDL claims.

In sum, even though the number of parties in the MDL has delayed the completion of those proceedings, the reasons for granting Defendants' initial motion and memorandum in support of the stay of discovery as to the market timing issues involving Bank of America's affiliated are still compelling and well support continuing the existing stay of discovery. *See* Defendants' Motion to Stay Discovery As to Issues of Market Timing Involving Bank Of America and Its Affiliated Mutual Funds [Dkt. No. 127] and Defendants' Memorandum of Law in Support of Their Motion to Stay Discovery As to Issues of Market Timing [Dkt. No. 128]. Discovery on all other issues in this action is currently ongoing, and Defendants have produced, and are continuing to produce, documents responsive to Plaintiffs' requests on a rolling basis.

WHEREFORE, for the reasons set forth above, Defendants respectfully request that the Court extend the current stay of discovery on the market-timing issues for 60 days from the date of the Court's order, or until such time as the MDL Court reviews and rules on the stipulated settlement of the market-timing MDL claims involving NationsBank/Bank of America, whichever is sooner.

Dated: October 15, 2009

Respectfully submitted,

/s/ Shannon M. Barrett

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## CERTIFICATE OF SERVICE

I, Dexter L. Pagdilao, Jr., HEREBY CERTIFY that on this 15th day of October, 2009 I electronically filed the foregoing Defendants' Motion To Stay Discovery As To Issues Of Market Timing Involving Bank Of America And Its Affiliated Mutual Funds with the Clerk of the Court using the ECF system, which will send notification of such filing to the counsel of record listed on the service list below.

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Dated: October 15, 2009

/s/ Dexter L. Pagdilao, Jr.  
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